



THE HAWAI'I INNOCENCE PROJECT – LAW OFFICES
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December 17, 2018

Attorney General Russell Suzuki
Department of the Attorney General
425 Queen Street
Honolulu, HI 96813

Re: Albert Ian Schweitzer v. State, SPP:3PR17-1-002; State v. Albert Ian Schweitzer,
Cr:3PC99-147

Dear Attorney General Suzuki:

We, the undersigned counsel, are attorneys with the Hawai'i Innocence Project and we join the Co-Director of the Hawai'i Innocence Project (Kenneth Lawson) in writing in regards to retired Seattle, Washington Superior Court Judge Michael Heavey, whom we assert has been engaged in the unauthorized practice of law in Hawai'i, and has been directly interfering in our representation of Albert "Ian" Schweitzer. The Hawai'i Innocence Project ("HIP") is a legal non-profit organization and law clinic at the University of Hawai'i's William S. Richardson School of Law, representing prisoners who have been wrongfully convicted in the State of Hawai'i. HIP, with the assistance of the Innocence Project (IP) based in New York, currently represents Ian Schweitzer in seeking post-conviction relief. HIP's Rule 40 petition is based on actual innocence and ineffective assistance of counsel, in the highly controversial Dana Ireland case, tried in the Third Circuit Court in Hilo, Hawai'i in 2000.

Beginning in 2014, a retired Seattle, Washington Superior Court Judge named Michael Heavey, began to involve himself and interfere in our investigation of Ian Schweitzer's case. Mr. Heavey has done so allegedly as part of an organization known as "Judges for Justice", but to our knowledge, Mr. Heavey is the only active member of that entity who has been coming to Hawai'i, meeting with those involved in Ian's case, and intruding in Ian's case and his attorney-client relationship with HIP attorneys. To our knowledge, Mr. Heavey, nor anyone else involved in his organization Judges for Justice, is not licensed or otherwise authorized to practice law in the state of Hawai'i. Despite numerous requests by Ian, his mother Linda Schweitzer, and HIP that Mr. Heavey not be involved in this case, he has continued to insert himself into the case and interfere with our attorney-client relationship with Ian Schweitzer. Please see the attached declarations expressing Ian (through the declaration of HIP Legal Fellow Jasmine Pontillas

Davé) and Linda's concerns about Mr. Heavey's involvement in the case, Exhibits 1 and 2, respectively. For the past four years, to HIP and Ian's dismay, Mr. Heavey has met with or otherwise contacted our client's former attorneys, current prosecutors, witnesses, co-defendants, and others directly associated with Ian's pending case. His interference in HIP's and Ian's attorney-client relationship and our investigation of Ian's case, greatly impairs HIP's ability to represent Ian. Mr. Heavey's actions constitute a violation of HRS § 605-14 and the Hawai'i Rules of Professional Conduct, thereby warranting further action.

Factual Background

In 1999, Ian, along with his brother Shawn Schweitzer, and Frank Pauline, Jr. were charged with the 1991 murder, kidnapping, and sexual assault of Dana Ireland. This case was extremely controversial and high profile and both Ian and Frank Pauline, Jr. were ultimately found guilty on all charges and sentenced to life imprisonment. Following Ian's trial, Shawn Schweitzer accepted a plea deal in 2000, was sentenced to one year in jail and five years' probation and released. After Ian's appeals were denied, Ian contacted the Hawai'i Innocence Project seeking assistance with his case on the basis that he is factually innocent of the crime. In 2017, we filed a Rule 40 Petition for Post-Conviction Relief on Ian's behalf, case number 3PR17-1-002, which was later amended and is still pending with the Third Circuit Court.

Mr. Heavey's initial contact with HIP was in October 2014, when former University of Hawai'i Law Professor and HIP director Virginia Hench invited Mr. Heavey to speak at the University of Hawai'i Law School about the Amanda Knox case, which had been tried in Italy. Mr. Heavey claimed to have played a major role in her exoneration, and he expressed interest in similarly collaborating with HIP on Ian Schweitzer's case in the hopes of exonerating Ian. Subsequently, Mr. Heavey without HIP's knowledge met with Ian's family members and multiple witnesses in Hilo and began communication with the forensic lab that was performing DNA testing in Ian's case. HIP did not authorize this conduct, and soon began to realize that the nature of Mr. Heavey's involvement was neither desired nor helpful to Ian's case. Mr. Heavey's knowledge of the case was ill-informed, his theories were not in line with those of Ian's legal team, and his tactics included immediate media attention, which HIP believed to be premature and risky. At this point, Mr. Heavey was not working with Ian's legal team in a constructive manner. Via email, as authorized by Ian and his family, Mr. Heavey was respectfully asked by HIP to cease further investigation in Ian's case, and not to speak with any witnesses, the media, prosecutors, or judges, unless asked to by the HIP legal team. Mr. Heavey was unwilling to promise that he would cease further work, and his relationship with HIP and Ian's family members grew more contentious.

HIP's concerns intensified when Mr. Heavey sent an envelope marked "Attorney Correspondence, Washington State Bar Assoc. # 6921" to Ian on March 24, 2015 and enclosed a letter in which Mr. Heavey acknowledged that Ian and his legal team had requested that Mr. Heavey refrain from assisting in Ian's case. Mr. Heavey also enclosed a letter from one of Ian's co-defendants, Frank Pauline, Jr. who was also incarcerated (in a New Mexico prison) at the time. See Exhibit 4. These actions gave rise to obvious concerns by HIP's lawyers that Mr. Heavey was creating the perception that he was Ian's attorney, and given the Saguaro facility rules prohibiting inmate-to-inmate communication, Ian also feared disciplinary action by the

Saguaro prison where Ian was being held. On March 31, 2015, Linda Schweitzer, Ian's mother, filed a grievance with the Washington State Bar Association (WSBA) under Complaint No. 201503310003 regarding Mr. Heavey's willful disregard of HIP's requests. While the file is quite voluminous, should you wish to review it, we would be happy to share the documentation from that Complaint. As a result of the WSBA's investigation, an advisory letter was issued to Mr. Heavey.

Despite all the above, Mr. Heavey has continued his actions. He has repeatedly contacted experts retained by HIP, requesting case updates and confidential information about the experts' DNA testing results. He has consulted with Hawai'i County prosecutors, and has held numerous meetings with their office (one as recently as December 11, 2018) to discuss Ian's case. Mr. Heavey even sends frequent direct email communication to Linda Schweitzer, and he has also contacted family members of a key witness from the case. In these emails, Mr. Heavey asks the individuals to discuss the case with him, and provides them with legal advice regarding their options, which elicits major concerns in the minds of Ian's lawyers.

A major part of Mr. Heavey's ongoing efforts revolves around an extensive media campaign he has launched, including advertisements placed in local newspapers, an hour-long video he created about the case, and direct solicitation of funds made to Hawai'i attorneys. A link to the video, and copies of the articles and email solicitations are attached hereto. From the beginning of our investigations in this case, HIP has actively worked to prevent media and public involvement. The Dana Ireland case is one of the most controversial and highly politicized cases in the history of Hawai'i, and Ian's legal team feared and continues to fear that any new publicity regarding the re-investigation of this case would prevent or at least inhibit witnesses from coming forward and new evidence from coming to light. Mr. Heavey's insistence on resurfacing this case through his media campaign has been detrimental to our efforts.

As a prime example, even though we urged him not to do so, Mr. Heavey initiated the release of a news article in 2015 about the innocence of the three defendants, and one day later, co-defendant Frank Pauline, Jr. was murdered on the yard at the New Mexico prison where he was serving time. We cannot say with certainty that there was a provable link between the two events, but the highly sensitive nature of this case is precisely the reason for HIP's decision to avoid publicity, at least until the matter is presented in open court. The hour-long video Mr. Heavey created is also of significant concern. While Mr. Heavey obviously has a first amendment right to make the video, the video contains key factual inaccuracies, and HIP has explained this to Mr. Heavey in our various requests for him to stop. His rebuttal has been that we are welcome to correct his factual errors, but for us to do so would require us to divulge confidential information, and thus is no remedy at all. Even Hawai'i County Prosecutor Mitch Roth has commented on the veracity of Mr. Heavey's version of the case. In a news article dated June 19, 2018, Mr. Roth states that "Heavey's theories have no factual evidence." Mr. Heavey's video additionally includes an interview he conducted with an eyewitness, who thereafter expressed fear for her safety and requested that her identity remain anonymous. Again, these are sensitive topics that are resurfacing, and the potential is high for relationships with witnesses to be damaged and most importantly, that Mr. Heavey's actions may well compromise Ian's legal right to present his case before the court in Hilo.

Mr. Heavey's campaign has also included frequent emails to members of the Hawaii State Bar Association, news agencies, and government officials regarding Ian's case. Through these emails, Mr. Heavey disseminates his theory of the case, urges recipients to watch his video, and solicits funds for the furtherance of his activities. Mr. Heavey does so through a listserv consisting of an unknown number of individuals. In one email to this listserv dated October 16, 2018, Mr. Heavey states, "What you don't see is the recipients of this mass email. Over 3,000 addressees are Hawaii attorneys, which include retired judges, spouse'[sic] of judges, etc. Who knows? Maybe members of the Hawaii Supreme Court are getting these emails." This action particularly creates concern that, for example, judges who will potentially preside over Ian's Rule 40 petition could be receiving Mr. Heavey's false information, may well feel compromised for having considered it and may have to recuse themselves from sitting on any proceedings involving this matter. Furthermore, recipients of Mr. Heavey's communications understandably believe that Mr. Heavey is associated with HIP and that he is working as part of Ian's legal team. It has taken a considerable amount of HIP's time and resources to attempt to mitigate this misperception and address all of the potential negative effects of Mr. Heavey's interference.

At this point, in addition to the advisory letter issued by the WSBA, Mr. Heavey has been asked by numerous individuals to stop his activities in relation to the Schweitzers' case. HIP, through the Hawaii State Bar Association, issued a statement to all members of the Bar with the hope of clarifying that Mr. Heavey does not work with HIP and has no association with HIP. See Exhibit 8. Since then, HIP attorneys have been removed from Mr. Heavey's listserv, but other Hawai'i attorneys continue to send Mr. Heavey's emails to HIP, as these attorneys find them to be disturbing. The attached exhibits include examples of these mass emails for your review; one recent email is dated October 16, 2018, in which he states, "Below is the 21st [Judges for Justice] "mass" email since February 28, 2018." Mr. Heavey's mass emails have been so frequent that the Department of the Corporation Counsel wrote to inform HIP that they would be asking the City's Department of Information Technology to block messages from Mr. Heavey's email address. In an email dated April 24, 2018, Corporation Counsel Donna Leong stated, "Based on the above, I have concerns about furthering the unauthorized practice of law in Hawaii and the use of city resources to solicit for a private non-profit that has no perceptible city-related purpose." See Exhibit 15.

Unauthorized Practice of Law

We write your office in part based on the belief that Mr. Heavey is violating Hawaii Revised Statute § 605-14, and the Hawaii Rules of Professional Conduct, Rule 5.5, by engaging in the unauthorized practice of law. HRS § 605-14 states, in pertinent part, that it is

unlawful for any person, firm, association, or corporation to engage in or attempt to engage in...the practice of law...except and to the extent that the person, firm, or association is licensed or authorized so to do by an appropriate court, agency, or office or by a statute of the State [of Hawai'i] or of the United States.

Furthermore, the Hawaii Rules of Professional Conduct, Rule 5.5, mandates that

A lawyer shall not:

- (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
- (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law[.]

The “practice of law” is not defined by either the legislature or the commentary to HRPC, Rule 5.5. Commentary to HRPC 5.5 states that “[t]he definition of the practice of law is established by law and varies from one jurisdiction to another.” In Fought & Co. v. Steel Eng’g & Erection, the Supreme Court of Hawai‘i noted that the state legislature intentionally left the “practice of law undefined”, and that the legislature clarified that:

The practice of law is not limited to appearing before the courts. It consists, among other things of the giving of advice, the preparation of any document or the rendition of any service to a third party affecting the legal rights...of such party, where such advice, drafting or rendition of service requires the use of any degree of legal knowledge, skill or advocacy.

Fought & Co. v. Steel Eng’g & Erection, 87 Hawai‘i 37, 45, 951 P.2d 487, 495 (1998) (quoting Sen. Stand. Comm. Rep. No. 700, in 1955 Senate Journal, at 661). While the Hawai‘i Supreme Court has similarly declined to define the “practice of law”, it provided further guidance in Fought regarding when out-of-state counsel has engaged in the unauthorized practice of law. Out-of-state counsel in Fought engaged in activity such as consultation with Hawai‘i counsel regarding the appeal of the case, preparation of the subcontractor’s statement in anticipation of mediation, assisting Hawai‘i counsel with legal research, analysis of briefs and papers submitted by other parties to the litigation, resolution of issues pertaining to the posting of a bond, planning strategy for the appeal, and reviewing and critiquing the briefs and other papers prepared by Hawai‘i counsel. Fought, 87 Hawai‘i at 46, 951 P.2d at 496. The court found that it was apparent that out-of-state counsel was “practicing law” when it engaged in these activities. Id. However, because all the services were performed in Oregon, both parties were located in Oregon, and Hawai‘i counsel remained at all times “in charge” of representation, the activities did not constitute the practice of law “within the jurisdiction” of Hawai‘i. Id. at 47, 951 P.2d at 497.

The nature of Mr. Heavey’s activities is analogous in part to that of the activities in Fought. He has continually consulted with both counsel and experts in Ian’s case. Though unsolicited, he has performed his own extensive research and analysis on the case and the merits of potential avenues of relief. Mr. Heavey has planned a legal strategy for moving forward. Moreover, this situation is distinguishable from Fought in that these services are being performed “within the jurisdiction.” Mr. Heavey’s email communication and media campaign have been almost exclusively aimed at Hawai‘i attorneys, prosecutors involved in Ian’s case, and witnesses or family members who are Hawai‘i residents. Moreover, Mr. Heavey has made numerous visits to Hawai‘i, where he has interviewed witnesses, met with attorneys and prosecutors involved in the case, and furthered his organizational campaign efforts to raise money. The guidance provided by Fought thus compels a finding of the unauthorized practice of law by Mr. Heavey “within the jurisdiction” of Hawai‘i.

Such a finding is also consistent with the legislative history of HRS § 605-14 cited to above. The legislature made clear that Mr. Heavey need not appear in court in order to be found in violation of the statute. The legislature specifically identified the “giving of advice,” which Mr. Heavey has done on numerous occasions, as one activity that constitutes the unauthorized practice of law. In an email dated November 29, 2018, Mr. Heavey wrote to Linda Schweitzer:

Hawaii Innocence Project (HIP) has asked me to not talk to/communicate with you since we talked when the video first came out last March. I don’t believe that is a proper request. I also fear they have scared you into not talking to me, that if you do, bad things will happen. I believe that is also improper and untrue. They are Ian’s lawyers, they do not control me or you. They have made mistakes in this matter, but I believe in going forward, not in dwelling on the past.

Advising Linda that HIP has erred in Ian’s representation and that she should therefore accept his legal assistance clearly constitutes giving her legal advice. Mr. Heavey has also given legal advice to the family of Michael Ortiz, who was a key witness presented by the State in Ian’s trial. In a December 9, 2018, email, Mr. Heavey writes to ask Michael Ortiz’s family members for his contact information and to meet with Michael Ortiz in the Hilo/Puna area on December 11, 2018. After explaining that new DNA testing may mean that Michael Ortiz’s testimony is the only factor preventing Ian’s exoneration, Mr. Heavey states, “He should know that if some of his testimony against Ian was not true that there can be no prosecution for perjury. The statute of limitations on that crime has long passed.” Assuring someone that he cannot be charged for a crime given the statute of limitations is quite clearly legal advice that Mr. Heavey is not authorized to give in the State of Hawai‘i. Please see the attached exhibits which include the aforementioned emails containing this advice. Additionally, as of the date of this filing, Mr. Heavey has sent an email to Ian’s entire legal team, the prosecutors assigned to Ian’s case, and Ian’s mother Linda Schweitzer. See Exhibit 34. In this email, dated December 17, 2018, Mr. Heavey, again, not licensed to practice law in the State of Hawai‘i, clearly seeks to give Ian’s legal team legal advice on a case pending in Hawai‘i State Court. Mr. Heavey advises us to obtain a public relations firm to organize a public recantation by Shawn Schweitzer, and even suggests that he (Mr. Heavey) represent Shawn at this event and that HIP withdraw.

Interference in Attorney-Client Relationship

In addition to Mr. Heavey’s violation of HRS § 605-14 and HRPC 5.5, HIP seeks the assistance of the Attorney General due to the interference that Mr. Heavey’s actions impose on HIP’s attorney-client relationship with Ian Schweitzer. One significant result of Mr. Heavey’s actions is the copious amount of time HIP has had to dedicate to mitigating the damage caused by Mr. Heavey’s actions, which interferes with our representation of Ian Schweitzer. Ian’s legal team has spent a considerable amount of time fielding questions from the recipients of the media campaign, communicating with Mr. Heavey himself in order to implore him to stop, and putting out other fires in an attempt to preserve the work we have done on Ian’s case over the last decade. Of course, this is time that has taken us away from doing actual work on Ian’s case, and thus directly compromises Ian’s best interests and the interests of successful litigation in his case. Furthermore, Mr. Heavey’s actions have already shown potential for damaging the rapport that HIP has established with witnesses, experts, the prosecution, and others involved in this case. As

an example, and in an attempt to sever the attorney-client relationship, Mr. Heavey's most recent email to Ian's legal team, prosecutors, and Linda, alleges that we are mishandling Ian's case and not doing an adequate job in getting Ian out of prison. See email dated December 17, 2018, attached as Exhibit 34. Though entirely without merit and not based on facts, Mr. Heavey's claims that we have made mistakes in our representation of Ian, certainly could damage our relationship with our client and his family.

As explained above, Mr. Heavey's efforts have created the illusion that he is working with or at least alongside HIP, and as a result, the false information Mr. Heavey gives and the inappropriate solicitation he engages in has been associated with HIP. The deterrent effect this has had on financial support for HIP and cooperation with HIP cannot be understated. Even our relationships with current and potential donors have been jeopardized, due to the belief that we are affiliated with Mr. Heavey. Our capacity to represent Ian to the best of our ability depends on the cooperative and honest relationships we have with witnesses, experts, and all others who support or can contribute to Ian's exoneration. Mr. Heavey's ongoing involvement continues to be a threat to that value.

Finally, Mr. Heavey's interference has inflicted extreme emotional distress on Ian and his family, especially, his mother Linda. Please see the attached declarations, Exhibits 1 and 2. Mr. Heavey has sent direct communication intermittently to Linda over the past four years, despite many requests from Linda that he stop. Mr. Heavey's recent emails to Linda have included attempts to speak with her, meet with her, or get documentation from her. In a recent email, Mr. Heavey notifies Linda of his visit to the Big Island on December 11, 2018, and his plans to continue his investigations and discussions with the prosecutor. Mr. Heavey had also asked Linda to meet with him on that date. Although Linda refused to respond to his requests, she explained that she felt nervous all day and feared that Mr. Heavey would show up at her work or home unannounced and uninvited. She frequently expresses frustration and anxiety about Mr. Heavey, and it causes her further discomfort to know that HIP's time has been expended to combat Mr. Heavey's intrusions and therefore has detracted from time that would otherwise be spent working directly on Ian's case.

In turn, Ian because he is in prison, is limited in his ability to comfort his mother and other family members, or to do anything himself about Mr. Heavey's interference. He has expressed feelings of helplessness knowing that Mr. Heavey's intrusion in his case is occurring and that Ian is not present to minimize its effects. As a high-profile inmate in a facility with many other Hawai'i prisoners, Ian further fears that his safety will be at risk if misinformation continues to spread and other prisoners believe that he is condoning Mr. Heavey's actions. All these events have severely interfered with our ability to represent our client Ian Schweitzer in this matter.

For your reference, in addition to the specific exhibits referenced above, attached hereto we have also included a small portion of the emails and documents that are representative of the actions of Mr. Heavey described herein. Should you wish to see further documentation, do not hesitate to reach out to us. Regardless of his claims that he wants justice for Ian, Mr. Heavey's actions and theories are directly opposed to and in conflict with HIP's legal strategy, and compromise the work that HIP is doing on Ian's case. We sincerely believe that if Mr. Heavey continues, a successful outcome of Ian's case, at least from Ian's point of view, will be in jeopardy. We

respectfully request that the Attorney General's Office take action in accordance with the grievances HIP has set forth in this letter.

Sincerely,

The Hawai'i Innocence Project, Schweitzer Legal Team:

/s/ Brook Hart, Esq., #723

/s/ William A. Harrison, Esq., #2948

The Hawai'i Innocence Project

/s/ Kenneth Lawson, Co-Director, Hawai'i Innocence Project

cc: Hawai'i State Bar Association
Office of Disciplinary Counsel, Hawai'i Judiciary
Office of Disciplinary Counsel, Washington State
Mitch Roth; Office of the Prosecuting Attorney, County of Hawai'i